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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

EUGENE H. DUFFY, *et al.*,
Petitioners,

v.

JAMES W. WETZLER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the New York Supreme Court Appellate Division—Second Department

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The petitioners respectfully submit this Reply Brief in response to the Briefs in Opposition filed by respondents.

I. ALL RESPONDENTS CONCEDE THAT THIS CASE RAISES A SUBSTANTIAL FEDERAL QUESTION —THE SAME QUESTION *SUB JUDICE* IN *HARPER*

The respondents concede that this case involves the issue of whether this Court's holding in *Davis* must be applied retroactively (State Resp. Br. 7-8; City Resp. Br. 5-7). Indeed, the City respondents *join* in the petitioners' request

that certiorari be granted. (City Resp. Br. 5) ("We, nevertheless, join petitioners' request that certiorari be granted since this issue is already before this Court in *Harper* . . . ."). However, the State respondents, notwithstanding their concession, continue to oppose the grant of the petition in order to deny petitioners their rights under 4 U.S.C. § 111 and the benefits of this Court's decisions in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989); *Barker v. Kansas*, —— U.S. ——, 112 S. Ct. 1619 (1992) and *Harper v. Virginia Dep't of Taxation*, 242 Va. 322, 410 S.E.2d 629 (1991), *cert. granted*, No. 91-794, 112 S. Ct. 1934 (1992) (sub judice).

The State respondents' opposition to the petition is without merit. Before the New York Court of Appeals, the State respondents asserted that this case involves "no significant issues of state law" and involves only a "federal question."[1] Having urged the New York Court of Appeals to decline review of the petitioners' case because this Court had granted certiorari in *Harper* to resolve the same "federal issue", the respondents should not be heard to complain that the petitioners have accepted the respondents' invitation to the "clear recourse to [this] Court . . . on this federal issue."[2] Absent a grant of the petition in this case, the petitioners and thousands of New York federal retirees will be denied the benefit of this Court's decision in *Harper* when it is handed down. Accordingly, "to ensure the uniform application of decisions construing constitutional requirements and to prevent states from denying or curtailing federally protected rights," *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 178 (1990) (plurality opinion), petitioners respectfully urge that this Court grant the petition for writ of certiorari.

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[1] *See* State Respondents' MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL, dated May 18, 1992, at 5-6.

[2] *See* State Respondents' MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL, dated May 18, 1992, at 6-7.

II. THE PETITIONERS HAVE BEEN DENIED A CLEAR AND CERTAIN REMEDY

The importance of granting the petition in this case is underscored by the meritless contention of the State respondents that "whether New York provides a remedy as a matter of state law remains to be decided in this case." (State Resp. Br. 8 n.6).[3] The respondents misdescribe the decision below. *See McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 49 n.34 (1990) ("We need not consider the import of this contention, however, because respondents misdescribe state law."). Even under the erroneous prospectivity analysis of the Appellate Division, it is indisputable that petitioners are entitled to a refund of their "overpayment" under the New York Tax Law if *Davis* is retroactive. (Pet. at 7a).[4]

The respondents' claims of good faith ring hollow. (St. Resp. Br. 9-10). The statutory refund right under the personal income tax law of New York has never been conditioned by or subject to a threshold determination of prospectivity. The right is inherently retroactive. (Pet. 18-20). The respondents' efforts to redefine state law for purposes of this case are disingenuous. As repeatedly and unqualifiedly stated by the Attorney General of New York to both the trial court and the Court of Appeals in *Hardwick v. Cuomo*, 891 F.2d 1097 (3d Cir. 1989), "none of the cases cited" in n.9 of the state respondents' Brief

[3] This assertion is directly contrary to the affidavit of the state respondents' counsel. *See* Affidavit of Arnold M. Glass, at ¶ 8, *Alderman v. Wetzler*, Index No. 6193/91 IAS Part 21 (Schlesinger, J.), Supreme Court of the State of New York, County of New York ("It is the Tax Department's position that it will follow a final judicial decision determining the issue of *retroactivity* of these refund claims . . . .") (emphasis added). In the wake of *Duffy*, the respondents initiated a course of action to extinguish the rights of the putative class. (R2. 420-442). *Alderman* was commenced in an effort to prevent the respondents from rendering a successful appeal in *Duffy* meaningless.

[4] *See* note 3 *supra*.

in Opposition "have any bearing here" under the personal income tax law. (R. 439). The respondents' feeble attempt to justify their unprecedented departure from the settled tax refund practice and law of the state in this case is "plainly untenable." *Ward v. Love County*, 253 U.S. 17, 22 (1920).

Petitioners also take exception to the City respondents' attempt to mislead this Court as to the issues and record in this case. Contrary to the assertion of the City (City Resp. Br. 6, 12-18), the Duffys were also residents of the City and subject to the enforcement of the City's tax for part of the period in issue. (R. 123-24). The record establishes that the claims of the Duffys presented a justiciable controversy even if the contentions of the City with respect to the Sweezys were otherwise meritorious. (R. 123-24, 513-17). Of course, the City's contentions with respect to the Sweezys are without merit. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8 (1989) ("Texas cannot strip appellant of standing by changing the law after taking its money.").[5]

III. THE NEW YORK COURTS ARE NOT AT LIBERTY TO REDEFINE THE FEDERAL CAUSE OF ACTION

1. None of the courts below considered this Court's decision in *Hafer v. Melo*, —— U.S. ——, 112 S. Ct. 358 (1991) (establishing that officials may be held individ-

[5] Equally disingenuous is the City's confusing attempt to preserve before this Court its defenses to *one* of the petitioners' grounds for refund relief. Below, the petitioners sought refund relief from the City under *two* alternative grounds—under section 687(a) of the Tax Law (Pet. 60a) and under a common law action for money had and received. (R. 224-246). The City's opposition addresses the latter grounds. With respect to petitioners' refund claims under section 687(a), there is no payment under protest requirement and petitioners have satisfied all procedural requirements of local law. (R. 514; R2. 639). Therefore, irrespective of the City's assertions with respect to the money had and received claim (City Resp. Br. 12), there is no independent state law ground adequate to support the Appellate Division's denial of petitioners' statutory rights to refunds.

ually liable under section 1983 for acts performed in the course of their official duties".[6] Contrary to the assertion of the State respondents (State Resp. Br. 12), the record in this case clearly establishes that the respondents were and are directly involved in the violation of the petitioners' rights. (R. 521-30). Indeed, respondent Wetzler has admitted that he was directly and personally involved in the conduct for which petitioners seek relief.[7] Given this direct personal involvement of the respondents, it was error to deny the petitioners the opportunity to go forward on their claims under 42 U.S.C. § 1983. *Hafer*, *supra*.[8]

The contention of the City and the individually named respondents that they cannot be held responsible for their conduct here (City Resp. Br. 24-5) is untenable. It is indisputable that the City and its tax officials are actively involved in and responsible for the formulation and implementation of City tax policy. *See*, *e.g.*, NEW YORK TIMES, October 20, 1992, METRO at A-1 (City and State officials announced 40 million dollars in City and State tax incentives to keep The Morgan Stanley Group in New York City). Historically, this has always been the case. *See*, *e.g.*, Van Cleve, *States' Rights and Fed-*

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[6] The trial court's decision was handed down before *Hafer* was decided. The Appellate Division's decision was handed down shortly after *Hafer* and does not address *Hafer*. The Court of Appeals denied review. (Pet. 5-6).

[7] *See* REPLY AND RESPONDING BRIEF FOR THE STATE DEFENDANTS, filed in the Appellate Division, at 22 ("[D]efendant Wetzler does not maintain that he was not personally involved . . . [H]e concededly is ultimately responsible . . . We submit, however . . . that the Commissioner should be absolutely immune from liability for such determinations.").

[8] Similarly, with respect to qualified immunity, the respondents' reliance upon *Swanson v. Powers*, 937 F.2d 965 (4th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 871 (1992) is misplaced. Here, unlike *Swanson*, the record establishes that the respondents as a matter of law were not entitled to assert the defense in the first instance. (Pet. 22-3 n.21).

eral Solvency, 1959 Wis. L. Rev. 190, 205-206 (detailing the involvement of City tax officials in thwarting the enactment of a tax upon the possessory interests of federal contractors in federal property).[9]

At bottom, the contention of the city respondents is that they have eyes to see, but have chosen to see not, and have ears to hear, but have chosen to hear not. Such a defense is manifestly inconsistent with the very purpose of 42 U.S.C. § 1983. *See Mitchum v. Foster*, 407 U.S. 225, 241 (1972).

2. The respondents do not controvert that the requirements for a class action have been satisfied in this case. Instead, they continue to assert that the enforcement of a federal cause of action may be defeated by the State placing conditions on the vindication of a federal right. (State Resp. Br. 14). Here the petitioners have been forced through almost four years of needless litigation to enforce a clearly established right. (Pet. 8 n.6). The filing fees and printing costs alone for seeking this Court's review far exceeds by several times the amount which the petitioners seek to recover. The respondents now attempt to foreclose other similiarly circumstanced citizens from a recovery by forcing them to individually establish the rights which properly should have been vindicated in one proceeding. The respondents' assertion that New York's doctrine of stare decisis will be sufficient to protect federal retirees is meritless. Throughout this litigation the respondents have consistently demonstrated that they are deftly playing games in order to extinguish as many claims as possible. (R2. 420-442).[10]

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[9] Ironically, city tax officials successfully opposed the tax upon federal contractors because they recognized that the doctrine of intergovernmental tax immunity required that an equal tax would have to be imposed upon the City's lessees. *Id.*

[10] *See also Alderman v. Wetzler*, Index No. 6193/91 IAS Part 21 (Schlesinger J.), Supreme Court of the State of New York, County of New York, note 3 *supra*.

The enforcement of a federal right should not be frustrated by parochial considerations which weigh only the interests of the wrongdoer. Here, the rights of this elderly putative class have been effectively rendered meaningless by the insurmountable financial burdens erected by the respondents.[11]

IV. PETITIONERS HAVE PRESERVED THE CLASS ACTION ISSUE

The City respondents contend that petitoners have somehow forfeited their right to review of the class certification issue. (City Resp. Br. 19-22). The City respondents argue that class certification was held to be "non-final" and thus non-reviewable.[12] The City is wrong. The only determination made by the Court of Appeals regarding "finality" concerned the *post-judgment* order denying leave to renew or reargue the motion for class certification. As to that portion of the Appellate Division's order, the Court of Appeals held that it "did not finally determine the action."[13] (Pet. 51a; 58a). However, with respect to the remaining issues sought to be appealed in the Appellate

[11] No discovery has been taken in this case since the case was decided by motions to dismiss and for partial summary judgment. However, based on the respondents' current estimated cost of refunds, it is estimated that the average claim of the 100,000 member putative class (R. 159) is approximately $550.00. *See* Brief Amici Curiae of the State of Utah, at 12, *Harper v. Virginia Dep't of Taxation*, No. 91-794. The fees just to file and serve an action in New York are $285.00. CPLR §§ 8018, 8020.

[12] Petitioners filed two motions involving class certification. First, petitioners applied for class certification at the trial court. (R. 249, 408). The trial court denied the motion. Petitioners next made a post-judgment motion for renewal and reargument of class certification. (R2. 417). Again the trial court denied petitioners' motion.

[13] Of course, the grant or denial of class certification is a procedural step within an action which does not, by itself, "finally determine" an action. Where the action is, as here, determined by a judgment, the grant or denial of class certification becomes ripe for appeal as part of the judgment.

Division's order, including that portion which upheld the trial court's *pre-judgment* order denying class certification, the Court of Appeals determined that "no substantial constitutional question was involved." (Pet. 51a; 58a).

In other words, the Court of Appeals determined that the class certification issue was "final" and went on to hold that it did not present a constitutional question and exercised its discretion in refusing to hear the appeal. Thus, the class certification issue was finally decided "by the highest court of the state in which a decision could be had." Here, that was the Appellate Division.

With respect to the issue of the proper court to which to appeal, the City respondents have again mischaracterized the state law relating to the taking of an appeal. Petitioners had a choice to seek leave to appeal from either the Appellate Division or the Court of Appeals. *See* CPLR 5602. (Pet. 63a). Both Courts have authority to grant permission to appeal. CPLR 5602(a); Newman, New York Appellate Practice § 11.03(2)(a) (1992). CPLR 5602(a) specifically provides that permission may initially be sought in either court, but may not be sought in both courts simultaneously and that it may be sought in both courts only if the Appellate Division first refuses. Here, petitioners properly sought permission to appeal in the Court of Appeals and such application was timely made. (Pet. 6).

The City advances the absurd argument (City Resp. Br. 21) that petitioners have lost their right on this issue by not seeking leave to appeal to the Court of Appeals from the Appellate Division *after* the Court of Appeals had already determined the appealability issue, as if the lower court could "reverse" the higher court on an issue of the higher court's jurisdiction. This is contrary to reason and to the statute. All steps have been properly taken to make this determination a "final" determination

of the issue by the highest state court which treated the issue.

The City's specious position on the class action question is further evidence of the continuing effort of the respondents to deny the petitioners' due process rights through the assertion of artificial and ill-founded procedural barriers to the proper redress of the wrongs committed.

CONCLUSION

For the reasons set forth above and in the Petition for Certiorari, petitioners request that their Petition for Certiorari be granted.

Respectfully submitted,

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